



DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 3

[Docket No. 230412-0101]

RIN 0605-AA64

Implementation of HAVANA Act of 2021

AGENCY: Department of Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule implements the HAVANA Act of 2021 (the Act) for the Department of Commerce (Department). The Act provides the authority for the Secretary of Commerce and other agency heads to provide payments to certain individuals who have incurred qualifying injuries to the brain. The rule covers current and former Department employees, and dependents of current or former employees.

DATES: *Effective date:* This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

Comments due date: To be assured of consideration, written comments on the interim final rule must be received no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: Submit comments on this interim final rule through the Federal eRulemaking Portal at <https://www.Regulations.gov>, Docket No. DOC-2023-0001. All comments submitted during the comment period permitted by this document will be a matter of public record and will generally be available on the Federal eRulemaking Portal at <https://www.Regulations.gov>.

Comments may also be submitted by mail to: HAVANA Rule Comments, Attention: Anna Kelley, Rooms 1844-1846, 1401 Constitution Avenue, NW, Washington, DC 20230. Any questions concerning the process for submitting comments should be submitted to Anna Kelley

at 202-482-2200 or anna.kelley@trade.gov. The information collection form associated with this rule, Eligibility Questionnaire for HAVANA Act Patients, is available at <https://www.Regulations.gov> under Docket No. DOC-2023-0001 and at <https://www.commerce.gov/havana-act>.

FOR FURTHER INFORMATION CONTACT: Charles Cutshall, Chief Privacy Officer, at 202-482-5735 or ccutshall@doc.gov.

SUPPLEMENTARY INFORMATION:

Background

On December 20, 2019, Congress gave authority (Pub. L. 116-94, division J, title IX, section 901) to the Department of State to pay benefits to certain individuals for injuries suffered after January 1, 2016 in the Republic of Cuba, the People’s Republic of China or another foreign country designated by the Department of State, in connection with certain injuries designated by the Secretary of State. These benefits were limited to Department of State employees, their dependents and other individuals affiliated with the Department of State.

On January 1, 2021, Congress amended that law (Pub. L. 116-283, div. A, title XI, section 1110), authorizing other Federal Government agencies (such as the Department) to provide similar benefits to their own employees for those injuries. Those provisions are codified at 22 U.S.C. 2680b.

On October 8, 2021, the “Helping American Victims Afflicted by Neurological Attacks” (HAVANA) Act of 2021 became law (Pub. L. 117-46). In the latest Act, Congress authorized Federal Government agencies to compensate affected current employees, former employees, and their dependents for qualifying injuries to the brain. Section 3 of the HAVANA Act of 2021 removed the requirement in Public Law 116-94, division J, title IX, section 901, that the qualifying injury occur in “the Republic of Cuba, People’s Republic of China, or other foreign country designated by the Secretary of State” for the purpose of making a payment under the HAVANA Act. The Act also requires the Department (and other agencies) to “prescribe

regulations” implementing the HAVANA Act not later than 180 days after the effective date of the Act. This interim final rule implements the HAVANA Act of 2021.

The regulation herein applies only to current and former employees of the Department, and dependents of current or former employees, as defined in § 3.2 of this rule.

Definitions

The rule follows the definitional template provided in the HAVANA Act and its predecessors. The rule defines certain categories of individuals as employees, as well as those who are not considered employees.

The term “covered employee” captures Department Foreign Service and Civil Service employees (regardless of the nature of their appointment), as well as National Oceanic and Atmospheric Administration Commissioned Corps Officers and students providing voluntary services under 5 U.S.C. 3111 who, on or after January 1, 2016, became injured by a qualifying injury to the brain while they were an employee of the Department.

The term “covered individual” captures any former employee of the Department (including retired or separated employees) who, on or after January 1, 2016, became injured by a qualifying injury to the brain while they were an employee of the Department.

The term “covered dependent” captures a family member of a Department current or former employee who, on or after January 1, 2016, became injured by reason of a qualifying injury to the brain while the dependent’s sponsor was an employee of the Department. For purposes of determining whether an individual is a covered dependent, the term “family members” includes unmarried children under 21 years of age (or certain other children) at the time of injury; parents; sisters and brothers; and spouses. Step-parents and step-siblings are included in the definition.

The definition of “qualifying injury to the brain” is based on current medical practices related to brain injuries. Further, the injury must have occurred in connection with certain hostile acts, including war, terrorist activity, or other incidents designated by the Secretary of State or

the Secretary of Commerce, as permitted by law, and must not have been the result of the willful misconduct of the individual. The individual must have: an acute injury to the brain such as, but not limited to, a concussion, penetrating injury, or as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies (to include computed tomography scan (CT), or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG); or a medical diagnosis of a traumatic brain injury (TBI) that required active medical treatment for 12 months or more; or acute onset of new persistent, disabling neurologic symptoms as demonstrated by confirming correlative findings on imaging studies (to include CT, MRI), EEG, physical exam, or other appropriate testing, and that required active medical treatment for 12 months or more.

In implementing this definition of “qualifying injury to the brain,” the Department adopts the standard set forth by the Department of State in its January 25, 2023, regulations implementing the HAVANA Act (see 88 FR 4722). With regard to these standards, this definition accounts for a variety of observable impacts to an individual, including either a concussion, a penetrating injury, or absent either of those, the ability of an appropriately certified physician to review one of a variety of forms of medical imaging evidence indicating permanent alterations in brain function. This will ensure there is some documented evidence of impact to the brain, while minimally circumscribing what that impact entails. The definition of “qualifying injury to the brain” will provide multiple avenues for demonstrating sustained, long-term impact to the individual. Establishing a 12-month threshold of active medical treatment is indicative of a long-term injury which the Department believes must be demonstrated prior to the awarding of benefits. For example, the Centers for Disease Control and Prevention (CDC) broadly defines chronic diseases “as conditions that last 1 year or more and require ongoing medical attention or limit activities of daily living or both.”

The definition of “other incident” is a new onset of physical manifestations that cannot otherwise be explained.

Eligibility for Payments

The Department will communicate with its entire workforce to inform them of the rule, regulations, and process for requesting payment. The Department will work together with potential recipients to provide the necessary documentation to qualify for payment. The Department believes these efforts will ensure all potential requestors will be able to identify themselves to the Department and begin the process of requesting a payment. However, Form CD-350, the form associated with developing the necessary evidence to submit a claim, will also be publicly hosted on the Department's public-facing website with instructions on how to contact the Department if a requestor believes they are eligible for a HAVANA Act payment.

Section 3.3 states the conditions required before the Department will consider payments to current or former employees and dependents of current or former employees: the qualifying injury to the brain for a former employee must have occurred on or after January 1, 2016, and while the former employee was an employee of the Department; and for a dependent, the injury must have occurred on or after January 1, 2016, and while the dependent's sponsor was an employee of the Department. The Director, Office of Human Resources Management, must approve any HAVANA Act payment.

Payments will be a one-time, non-taxable, lump sum payment, based on the annual salary of an Executive Schedule III employee (*see* 5 U.S.C. 5311 *et seq.*). The payment is non-taxable pursuant to 22 U.S.C. 2680b(g). As indicated in § 3.3, in determining the amount of the payment, the Department will consider (1) the responses on Form CD-350 and (2) whether the Department of Labor, Office of Workers' Compensation Programs (DOL) has determined that the requestor has no reemployment potential, or the Social Security Administration (SSA) has approved the requestor for Social Security Disability Insurance or Supplemental Security Insurance, or the requestor's board-certified physician has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence in Activities of Daily Living.

The award thresholds are based on the annual rate of basic pay for Level III of the Executive Schedule (ES). A Base payment will be 75 percent of Level III pay and a Base Plus payment will be 100 percent of Level III pay. If the requestor meets any of the criteria listed in (2) in the paragraph immediately above, the requestor will be eligible to receive a Base Plus payment. Requestors with a documented “qualifying injury to the brain” but who do not meet any of the criteria listed in (2) in the paragraph immediately above will be eligible to receive a Base payment. The criteria established in (2) in the paragraph immediately above are reflective of the Department’s objective of ensuring that the individuals most severely affected by anomalous health incidents (AHIs) (as indicated by a lack of reemployment potential, an inability to engage in substantial gainful activity, or the need for a full-time caregiver) receive additional payment. The specific use of the DOL or the SSA determinations is to ensure that both current and former Federal employees as well as covered dependents have access to a mechanism for this determination. The Department recognizes that criteria DOL and SSA use in their disability determinations are distinct, as well as the fact that the procedural timelines for seeking and receiving approval may be different between these agencies. The third option, that a board-certified physician certifies that the individual requires a full-time caregiver for activities of daily living (as defined by the Katz Index of Independence in Activities of Daily Living), provides an alternative mechanism for all individuals. Finally, the Department notes that if a requestor who received a Base payment later meets any of the criteria listed in (2) above, the requestor may apply for an additional payment that will be the difference between the Base and Base Plus payment. As the payments are tied to the Executive Schedule, the amounts may change over time based on increases to that Schedule.

The Department may consult with the appropriate officials in other Federal agencies to identify their current and former covered employees, and current and former dependents who reported an anomalous health incident. The Department will not process payment for employees, former employees, or dependents of current or former employees of other agencies. While

payments under the HAVANA Act may be on top of other leave, disability, or workers' compensation payments the requestor is receiving or may be entitled to receive that also help augment any loss of income, the Department believes this is an appropriate additional payment. The Department also believes this amount is the most it can reasonably compensate each requestor while ensuring available funds for all expected payments. The Department also notes that, because payments are contingent on appropriated funds, all payments will be paid out on a first come, first served basis. This is also in accordance with compensation awarded by the Department of State under the HAVANA Act.

Regulatory Analysis

Administrative Procedure Act

This rule is being published as an interim final rule and is effective immediately upon publication. Because this rule is a matter relating to public benefits, it is exempt from the requirements of 5 U.S.C. 553. *See* 5 U.S.C. 553(a)(2). In particular, the provisions of sections 553(b), 553(c), and 553(d) for advance notice, opportunity for comment, and delay in the effective date do not apply. It is in the public interest for this rule to become effective as soon as practicable in order to ensure expeditious payments to injured persons. The Department seeks comment from interested persons on the provisions of this rule and will consider all relevant comments in determining whether additional rulemaking is warranted under the provisions of the HAVANA Act.

Regulatory Flexibility Act

The Chief Counsel for Regulations for the Department certifies that this rulemaking will not have a significant impact on a substantial number of small entities. This rule applies only to certain individuals who are current and former Department employees and family members who are eligible for payments as a result of certain injuries. Therefore, the rule will provide for payments to certain individuals, and is therefore not expected to impact any small entities. As a

result, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and none has been prepared.

Executive Order 12866 and Executive Order 13563

This rule has been determined to be significant under Executive Order 12866. Potential causes of AHI are being investigated but remain unknown. Given the nature of the incidents, it is difficult to accurately estimate future incidents and numbers of individuals affected. For fiscal year (FY) 2023, the Department has been authorized to spend up to \$5 million to pay claims that it finds to be substantiated.

The Department has reviewed the rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and finds that the benefits of the rule (in providing mechanisms for individuals to obtain compensation for certain injuries) outweigh any costs to the public. The Department has also considered this rulemaking in light of Executive Order 13563 and affirms that this regulation is consistent with the guidance therein.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), the information collection associated with this rule, Form CD-350, the Eligibility Questionnaire for HAVANA Act Patients, was approved by the Office of Management and Budget (OMB) for clearance under a 6-month emergency authorization under OMB Control Number 0690-0037. Form CD-350 has been uploaded to this rule's docket on regulations.gov (see **ADDRESSES** section above). The Department of Commerce intends to request approval for a full 3-year OMB clearance to cover the Eligibility Questionnaire for HAVANA Act Patients information collection request. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 15 CFR Part 3

Federal retirees, Government employees, Health care.

Accordingly, for the reasons stated in the preamble, the Department adds part 3 to subtitle A of title 15, Code of Federal Regulations, to read as follows:

PART 3-IMPLEMENTATION OF THE HAVANA ACT OF 2021

Sec.

3.1 Authority.

3.2 Definitions.

3.3 Eligibility for payments by the Department of Commerce.

3.4 Consultation with other agencies.

Authority: 22 U.S.C. 2680b.

§ 3.1 Authority.

(a) Under section 3 of the HAVANA Act of 2021 (Pub. L. 117-46), codified in 22 U.S.C. 2680b, the Secretary of Commerce or other agency heads may provide a payment for a qualifying injury to the brain to a covered employee or covered dependent, who incurred a qualifying injury to the brain on or after January 1, 2016. The authority to provide such payments is at the sole discretion of the Secretary or their designee.

(b) The regulations in this part are issued in accordance with 22 U.S.C. 2680b(i)(4) and also apply to former covered employees of the Department of Commerce and their covered dependents.

§ 3.2 Definitions.

(a) *Covered employee.* (1) An employee of the Department of Commerce who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain.

(2) The following are considered employees of the Department of Commerce for the purposes of this part: Department of Commerce employees in the Foreign Service, National Oceanic and Atmospheric Administration Commissioned Corps Officers, and Department of Commerce

employees who meet the definition of “employee” set forth in 5 U.S.C. 2105(a), including students providing volunteer service under 5 U.S.C. 3111.

(3) The following are not considered employees of the Department of Commerce for purposes of this part: employees or retired employees of other agencies.

(b) *Covered dependent.* A family member of a Department of Commerce current or former employee who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain while the dependent’s sponsor was an employee of the Department of Commerce as specified in paragraph (a)(2) of this section.

(c) *Covered individual.* A former employee of the Department of Commerce who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain while they were an employee of the Department of Commerce as specified in paragraph (a)(2) of this section.

(d) *Family member.* For purposes of determining “covered dependent,” a family member is defined as follows:

(1) Children who are unmarried and under 21 years of age at the time of the qualifying injury or, regardless of age, are unmarried and due to mental and/or physical limitations are incapable of self-support. The term “children” must include natural offspring, step-children, adopted children, and those under permanent legal guardianship (at least until age 18), or comparable permanent custody arrangement, of the employee or spouse or domestic partner when dependent upon and normally residing with the guardian or custodial party, and U.S. citizen children placed for adoption if a U.S. court grants temporary guardianship of the child to the employee and specifically authorizes the child to reside with the employee in the country of assignment before the adoption is finalized;

(2) Parents (including stepparents and legally adoptive parents) of the employee or of the spouse or of the domestic partner;

(3) Sisters and brothers (including stepsisters or stepbrothers, or adoptive sisters or brothers) of the employee, or of the spouse when such sisters and brothers are at least 51 percent dependent

on the employee for support, unmarried and under 21 years of age, or regardless of age, are physically and/or mentally incapable of self-support; and

(4) Spouse.

(e) *Qualifying injury to the brain.* (1) The injury must have occurred in connection with war, insurgency, hostile act, terrorist activity, or other incidents designated by the Secretary of State or the Secretary of Commerce, as permitted by law, and was not the result of the willful misconduct of the individual; and

(2) The individual must have:

(i) An acute injury to the brain such as, but not limited to, a concussion, penetrating injury, or as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies (to include computed tomography scan (CT), or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG); or

(ii) A medical diagnosis of a traumatic brain injury (TBI) that required active medical treatment for 12 months or more; or

(iii) Acute onset of new persistent, disabling neurologic symptoms as demonstrated by confirming correlative findings on imaging studies (to include CT or MRI), or EEG, or physical exam, or other appropriate testing, and that required active medical treatment for 12 months or more.

(f) *Other incident.* A new onset of physical manifestations that cannot otherwise be readily explained.

§ 3.3 Eligibility for payments by the Department of Commerce.

(a) The Department of Commerce may provide a payment to covered individuals, as defined this section, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified physician from the American Board of Psychiatry and Neurology (ABPN), the American Osteopathic Board of Neurology and Psychiatry (AOBNP), the American Board of Physical Medicine and Rehabilitation (ABPMR), or the American Board of Physical Medicine

and Rehabilitation (AOBPMR); and occurred on or after January 1, 2016, and while the individual was a covered employee of the Department of Commerce.

(b) The Department of Commerce may provide a payment to covered employees, as defined in this section, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified physician from ABPN, AOBPN, ABPMR, or AOBPMR; and occurred on or after January 1, 2016, and while the employee was a covered employee of the Department.

(c) The Department of Commerce may provide a payment to a covered dependent, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified physician from the ABPN, AOBPN, ABPMR, or AOBMR; and occurred on or after January 1, 2016, and while the dependent's sponsor was a covered employee of the Department.

(d) Payment for a qualifying injury to the brain will be a non-taxable, one-time lump sum payment.

(e) The Department will determine the amount paid to each eligible person based on the following factors:

(1) The responses on Form CD-350, "Eligibility Questionnaire for HAVANA Act Payments"; and

(2) Whether the Department of Labor has determined that the requestor has no reemployment potential, or the Social Security Administration has approved the requestor for Social Security Disability Insurance or Supplemental Security Insurance (SSI) benefits; or the requestor's ABPN, AOBPN, ABPMR, or AOBPMR-certified physician has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence of Daily Living.

(3) The award thresholds are based on the Level III of the Executive Schedule: Base payment will be 75 percent of Level III pay, and Base Plus payment will be 100 percent of Level III pay. If the requestor meets any of the criteria listed in paragraph (e)(2) of this section, the requestor will be eligible to receive a Base Plus payment. Requestors who are otherwise eligible for

payment for a qualifying injury to the brain (defined in § 3.2(e)) but do not meet any of the criteria listed in paragraph (e)(2) of this section will be eligible to receive a Base payment. If a requestor who received a Base payment later meets any of the criteria listed in paragraph (e)(2) of this section, the requestor may apply for an additional payment that will be the difference between the Base and Base Plus payment.

(f) The Director, Office of Human Resources Management may approve payments under this section. The Office of Human Resources Management will notify individuals of the decision in writing.

(g) An appeal of a decision made by the Director, Office of Human Resources Management may be directed to the Deputy Assistant Secretary for Administration in writing. The Deputy Assistant Secretary for Administration is the final appeal authority. The Office of Human Resources Management will notify individuals of the decision in writing.

§ 3.4 Consultation with other agencies.

The Department may consult with the appropriate officials in other Federal agencies to identify their current and former covered employees, and current and former dependents who reported an anomalous health incident. The Department will not process payment for employees, former employees, or dependents of current or former employees of other agencies.

Dated: April 14, 2023.

Jeremy Pelter,

*Acting Chief Financial Officer and Assistant Secretary of Commerce for Administration,
U.S. Department of Commerce.*